

an acceptably-prompt receptivity on the part of the public in sufficient numbers to permit the DTV transition to proceed to an early and successful conclusion.

Channel Capacity

16. Pappas submits that concerns over cable system channel capacity as a limiting factor on the Commission's ability to accord must-carry status to DTV broadcast transmissions are overstated. The *Fourth Annual Report* indicates that average channel capacity for cable systems in the United States increased 13.6%, to 58.6 channels, in the nine months between September, 1996 and June, 1997. 13 FCC Rcd at 1040. That annualizes to a yearly channel capacity growth rate of 18%, without any federal obligation to engage in such expansion. The cable industry -- on its own and in the absence of any federal mandate to do so -- is growing itself out of any perceived channel capacity limitations. The *Fourth Annual Report* further indicates that 98.2% of cable subscribers are served by systems with 30 channels or more, and the number of subscribers served by systems with 54 channels or more increased by 2.15 million, or 6.4%, between October, 1996 and October, 1997, and now stands at 58.4% of all cable subscribers. *Id.* at 1050, Paragraph 17. As a measure of cable's ability to continue to support such capacity expansion, the *Fourth Annual Report* also states that annual cable industry revenue grew by 8.9%, to \$27,120,000,000, between 1995 and

1996 and that projected 1997 total industry revenue will be approximately \$30 billion, a 9.9% increase over 1996 revenue. *Id.* at 1053, Paragraph 22.

17. Moreover, cable is making more efficient use of its existing bandwidth. The *Fourth Annual Report* shows that several large cable multiple system owners ("MSOs") are beginning to expand their offering of digitally-compressed services. *Id.* at 1063-64, Paragraph 46. Advanced digital compression techniques, including one known as statistical multiplexing, may permit operators to fit as many as 24 video channels within a single, 6 MHz analog channel (a 24:1 ratio). In general, the *Fourth Annual Report* states, compression ratios have dramatically increased over the 6:1 ratios that were formerly prevalent. *Id.* at 1128, Paragraph 173.

18. It must also be remembered that the advent of DTV will be a phased process; not all DTV signals will come "on-line" at once. Many stations -- including those in the markets below the Top 30, in which the majority of Pappas's stations find themselves -- will not be required to commence DTV service for another three-and-a-half years (an additional year is provided for noncommercial, educational DTV stations). During that period, cable can be expected to continue to increase its channel capacity and to make ever more efficient use of its existing channel capacity. Thus, Pappas submits that the channel capacity "issue" is, in fact, a non-issue.

19. Section 614(b)(1)(B) of the 1992 Act, codified at 47 U.S.C. Section 534(b)(1)(B) (1997), limits the local commercial television broadcast station signal carriage obligations of cable systems having more than 12 usable activated channels to one-third of the aggregate number of such channels. The *NPRM* considers the one-third limitation to be applicable in the digital environment. *NPRM* at Paragraph 51. Pappas urges the Commission to define the one-third limitation in terms of total data throughput capacity of a cable system, *i.e.*, bits per second of digital data. See *NPRM* at Paragraph 60. To do otherwise would be to reward inefficient use of bandwidth.

Relief for Small Cable Systems

20. At the outset, Pappas observes that smaller cable television systems are typically located in smaller DMAs. As a consequence, the arrival of broadcast DTV will be postponed in those markets for several more years, and does not pose an immediate problem. (Stations in markets below the 30 largest markets are not required to commence DTV service until May 1, 2002; see *NPRM* at Paragraph 10.) Moreover, in such smaller DMAs there are fewer analog stations and consequently there will be fewer DTV signals that will require mandatory carriage under the proposals advocated in these Comments. In any event, Pappas believes that the

statutory definitions and relief provisions for small cable systems that are set forth in Section 614 -- *i.e.*, systems that operate with 12 or fewer usable activated channels need carry only three local commercial television signals, and systems having 300 or fewer subscribers have no mandatory carriage obligations ^{5/} -- should be applied to DTV must-carry requirements. To do otherwise would substitute the Commission's judgment for that of Congress.

Duplicate Analog and Digital Signals

21. The *NPRM* points out that Section 614(b)(5) of the 1992 Act, codified at 47 U.S.C. Section 534(b)(5) (1997), relieves a cable operator from the must-carry requirements to the extent that a signal otherwise entitled to mandatory carriage on the operator's system "substantially duplicates the signal" of another local commercial television station that is being carried by the system. The *NPRM* questions whether this provision, *ipso facto*, precludes must-carry rights for an analog transmission and a DTV transmission during the latter part of the transition period, when certain minimum percentages of video programming must be simulcast on the two signals, and after April 1, 2005, when the simulcasting requirement becomes 100%

^{5/} See Section 614(b)(1)(A) of the 1992 Act, codified at 47 U.S.C. Section 534(b)(1)(A) (1997).

under the *Fifth Report and Order*. See *Fifth Report and Order*, 12 FCC Rcd at 12833, Paragraph 56; *NPRM* at Paragraphs 69-70.

22. Pappas submits respectfully that the “substantial duplication” language of Section 614(b)(5) should not be construed to refer to the content of a program transmitted by a signal, but rather the signal itself. Indeed, the statute does not refer to substantial duplication of a “program” of another local commercial television station which is carried on the system, but instead refers to substantial duplication of a “signal” of another local commercial television station which is carried on the system. Pappas believes that an analog signal and a DTV signal do not “duplicate” each other, regardless of the programming content of the two signals, because they are transmitted in different formats and cannot both be received by the same consumer equipment absent set-top converters. To hold otherwise would force the conclusion that the simulcasting requirements set out in the *Fifth Report and Order* effectively predetermined, under Section 614(b)(5), the outcome of the inquiry into the need for must-carry requirements for DTV broadcasting; and since it is clear that the Commission did not intend in the *Fifth Report and Order* to reach the question of DTV must-carry ^{6/}, such a conclusion cannot be supported.

^{6/} “In order to obtain a full and updated record on the applicability of the must-carry and retransmission consent provisions in the digital context, particularly in light of the *Turner II* decision, we intend to issue a Notice to seek additional comments
(continued...) ”

Primary Video

23. The *NPRM* addresses the requirement in Section 614(b)(3) of the 1992 Act, codified at 47 U.S.C. Section 534(b)(3) (1997), that a cable operator must carry the “primary video, accompanying audio, and line 21 closed caption transmission” of each local commercial television station carried on the cable system. *NPRM* at Para. 71. The *NPRM* asks whether “primary video” should be defined to mean the analog signal only. *Id.* Pappas respectfully submits that primary video should be defined, as the context of its use in Section 614(b)(3) suggests, to mean the video content of the signal that is transmitted by the broadcaster with the intention that it be received by all consumers equipped with analog receivers, digital receivers, set-top converter boxes, or any combination of them. (The statute, although not defining primary video, contrasts that phrase with alternative treatment accorded to “program-related material carried in the vertical blanking interval or on subcarriers.”) Pappas again reminds the Commission that construction of the statute in such a manner as to constrict the rapid and widespread deployment of DTV will only prolong and complicate the national transition to digital television.

^{6/} (...continued)
on these issues.” *Fifth Report and Order*, 12 FCC Rcd at 12853, Para. 106.

Use of PEG Channels for DTV Purposes

24. Because noncommercial, educational (“NCE”) television stations and low-power television (“LPTV”) stations enjoy substantial viewership, and because encouraging the earliest and largest possible migration of viewers to DTV is clearly desirable, Pappas supports the Commission’s proposal to allow a cable operator to place the DTV signals of NCE and LPTV stations on unused public, educational, and governmental (“PEG”) channels on the cable operator’s system. *See NPRM*, at Paragraph 74.

Tier Placement and Channel Positioning

25. At Paragraphs 75-77 of the *NPRM*, the Commission raises several questions concerning the placement of DTV signals on cable programming tiers. The Commission begins by observing that Section 614(b)(7) of the 1992 Act, codified at 47 U.S.C. Section 534(b)(7) (1997), requires that all commercial must-carry signals be made available to all subscribers of a cable system and be viewable on all of the subscriber’s television receivers that are connected by the cable operator or for which the cable operator provides a connection. The *NPRM* requests comment on the

implications of this statute for placement of DTV broadcast signals on a cable system's programming tiers.

26. Consistent with its belief that the public interest will best be served by promoting the fastest and widest acceptance of DTV by the public, Pappas submits respectfully that DTV signals of broadcasting stations that are retransmitted by cable systems must be available to all subscribers of that system without additional charge and without any inconvenience. This does not mean that the DTV signals of local commercial stations must be available on the same basic tier as the analog signals that are entitled to must-carry treatment, although grouping all of the local commercial station signals (analog or digital) on the same tier has obvious benefits to the subscriber. However, it does mean that broadcast DTV signals should not be placed on a special tier with digital cable programming and made accessible only to subscribers with digital receivers or set-top boxes; such an arrangement would defeat the purpose of Section 614(b)(7).^{7/} Pappas reads that statute as requiring cable operators to offer converter boxes to subscribers, if the DTV signals of local commercial broadcast

^{7/} To the same extent that Pappas believes that Section 614(b)(4)(B) of the 1992 Act requires the Commission to amend its must-carry rules to "ensure" cable carriage of the DTV transmissions of local commercial television stations that have modified their signals to conform to the Commission's standards for DTV (*see* Paragraphs 1 through 5 of these Comments, *supra*), Pappas believes that other provisions of Section 614 of the 1992 Act pertaining to must-carry with respect to analog signals should be equally applicable to must-carry with respect to DTV signals.

stations that are entitled to mandatory carriage cannot be received without such boxes.

See Paragraph 77 of the NPRM.

27. While certain channel selection devices, advanced programming retrieval systems, and channel mapping protocols may tend to lessen the importance of channel number designations on cable systems in the latter stages of the transition period, it is important at the outset in promoting the accessibility of DTV to the public for broadcasters to be able to publicize a single channel number where a station's DTV programming may be found on all of the local cable systems. This permits continuity of the DTV signal's channel number designation from one local cable system to another and reduces the risk of public confusion. Therefore, it is important for the cable operator to defer to the broadcaster in the selection of channel number designations for DTV broadcast signals. Congress recognized, in the 1992 Act, that disadvantageous channel repositioning was one of the anti-competitive tools that the cable industry has historically used to handicap local analog television stations. *See* Section 2(a)(15) of the 1992 Act, Pub. L. No. 102-385, 106 Stat. 1460 at 1462, quoted in Paragraph 6 of these Comments, *supra*. Deference to broadcasters would also avoid the problem identified in the findings in the 1992 Act.

Television Market Modifications

28. Pappas believes that an analog station's "market," for purposes of Section 614 of the 1992 Act, should also define the associated DTV station's "market" for the same purposes. Over time, as DTV becomes a more accepted medium for the advertising and viewing communities, it is possible that an analog station's market might be defined differently from the associated DTV station's market. But in the early stages of the transition, such differences would only contribute to public confusion (with the possibility that the must-carry rights of the analog and DTV signals would have different geographical limits) and should be avoided.

Input Selector or "A/B" Switch

29. Pappas strongly opposes any attempt to revert to the input selector, or "A/B" switch, as a means of avoiding cable systems' must-carry obligations. Pappas again emphasizes that the speed with which advertisers and the public accept and become comfortable with DTV as a new medium will have far-reaching consequences for the success of the transition and the ability to return analog spectrum to the federal government at the end of 2006. Relegating cable subscribers' access to local commercial broadcast stations' DTV signals to the use of an A/B switch

will stigmatize such signals and will not promote their rapid acceptance. Thus, even if the A/B switch is now more prevalent than it was in 1992, when Congress made a specific finding that reliance upon such devices was not “. . . an enduring or feasible method of distribution . . .” and “. . . not in the public interest. . . .,”^{8/} that would not urge its use as an alternative to mandatory carriage of local commercial stations’ DTV transmissions.

Cable Rate Regulation

30. The *NPRM* questions whether the addition of the DTV signals of local commercial television broadcasting stations on a cable operator’s system should be a basis for permitting the operator to raise its subscriber rates in order to defray the costs of such addition. *NPRM* at Paragraphs 90-93. With the goal of fostering early and wide public acceptance of DTV, Pappas believes that it would be disastrous if cable systems were permitted to raise their rates to their subscribers and then attribute the rate increases to carriage of the DTV signals of local commercial broadcast stations. Such a situation would create quite the opposite of public acceptance of DTV; the cable subscribers would blame DTV for the increased cost of access to their cable systems.

^{8/} Section 2(a)(18) of the 1992 Act, Pub. L. No. 102-385, 106 Stat. 1460 at 1462 (1992), quoted in Paragraph 6 of these Comments, *supra*.

There is an equitable element to compelling the cable industry to absorb the costs of adding DTV broadcast transmissions and not passing those costs along to subscribers: broadcasters are being compelled to bear a substantial financial burden and a risk, by incurring the costs of the DTV build-out with no assurance that there will be audiences for the programming or advertising to support the service. It is not too much to ask of cable systems to ante up their share of the costs of delivering this new medium to their consumers -- especially given the robustness of the cable industry's recent revenue growth, estimated to reach \$30 billion in 1997 on a nearly double-digit increase from the prior year, as reflected in the *Fourth Annual Report* (see Paragraph 16 of these Comments, *supra*).

Subscriber Notification

31. In response to Paragraph 94 of the *NPRM*, Pappas proposes that a cable system be required to notify its subscribers, in the manner specified in the Commission's rules for the system's notification to its subscribers of the addition or the deletion of channels, whenever a DTV signal is added or (as December 31, 2006 approaches) an analog signal is withdrawn.

Program Exclusivity and Significant Viewing

32. Pappas strongly opposes any changes to the Commission's network non-duplication ("non-dupe"), syndicated program exclusivity ("syndex"), or sports blackout rules, particularly in the context of this proceeding. Those rules provide a local station with protection against a cable system's importation of programming from a distant station that is identical to programming in which the local station (and/or its network) has invested with the expectation that the local station's exhibition of such programming will be on an exclusive basis within the local station's home market. The *NPRM* questions whether such rules " . . . are applicable in the digital age, with or without must carry, and whether it would be possible to repeal these rules and instead rely upon the retransmission consent provisions of Section 325 of the Act to protect the rights in question." *NPRM* at Paragraph 96.

33. In the first instance, as noted in Paragraphs 11 through 13 of these Comments, *supra*, retransmission consent is not practically available to a large number of stations, including all but one of Pappas's stations, because those stations simply do not have the bargaining leverage to negotiate acceptable arrangements with their local cable systems. Exclusive reliance upon retransmission consent diminishes the wisdom of Congress's decision in 1992 to provide must-carry as an alternative to

retransmission consent for those stations that could not expect to reach retransmission consent agreements with their local cable operators. Moreover, since the Commission's program exclusivity regulations give a station that is not carried on a cable system the right to enforce those regulations against the system, the cable operator is not able to sidestep the station's exclusivity rights simply by declining to carry the station; under the Commission's proposal to rely upon retransmission consent, by contrast, a cable operator could sidestep the local station's exclusivity rights simply by refusing to enter into a retransmission consent agreement with the station, and the station would have no recourse.

34. The Commission's non-dupe, syndex, and sports blackout rules are the products of careful consideration of numerous and complicated issues involving the competing interests of program rights owners, program distributors and syndicators, local stations, cable systems, distant stations, and the public. Those rules were crafted in the context of lengthy and contentious rule making proceedings. It would be a serious mistake for the Commission to introduce into this already-complicated proceeding involving mandatory cable carriage of the DTV transmissions of local broadcast stations the question of revisiting and possibly repealing the non-dupe, syndex, and sports blackout rules. The advent of DTV will present enough new challenges; the affected industries hardly need to grapple with the additional

complications of simultaneously undergoing possible changes in the program exclusivity regulations. Pappas urges the Commission to leave those regulations in place, at least until the nation has had several years of experience with the transition to DTV.

35. The Commission's rules contemplate that a non-local station may establish that it is "significantly viewed" in areas outside of its home market, thereby entitling such station to certain rights and privileges normally accruing only to stations that are local in those areas. The *NPRM* questions whether the arrival of DTV necessitates a change in the definition of "significant viewing." Again, with the objective of avoiding extraneous distractions to the cable and television broadcasting industries during the traumatic passage through the transition period from analog to digital, Pappas urges the Commission to treat as significantly viewed in any area a DTV signal whose companion analog station has been declared to be significantly viewed in that same area. Such a solution will promote stability and predictability and, as an added dividend, will also advance the carriage of DTV signals outside of their home markets, leading to the faster and more widespread public acceptance of digitally-transmitted broadcast programming. When the transition period shall have reached a stage of greater maturity, and the extent of the viewership of DTV broadcast

programming shall be better known, the task of defining which levels of DTV viewing should be deemed significant and which should not can be more confidently undertaken.

WHEREFORE, Pappas respectfully urges the Commission to amend its rules in accordance with the foregoing Comments.

Respectfully submitted,

PAPPAS TELECASTING INCORPORATED

**PAPPAS TELECASTING OF THE MIDLANDS,
A CALIFORNIA LIMITED PARTNERSHIP**

PAPPAS CONCORD PARTNERS

**PAPPAS TELECASTING OF NEVADA,
A CALIFORNIA LIMITED PARTNERSHIP**

**PAPPAS TELECASTING OF LEXINGTON,
A CALIFORNIA LIMITED PARTNERSHIP**

**PAPPAS TELECASTING OF OPELIKA,
A CALIFORNIA LIMITED PARTNERSHIP**

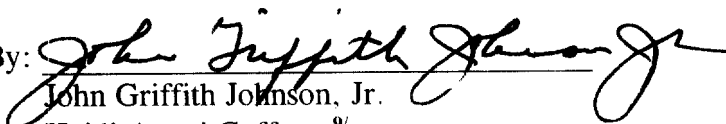
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**PAPPAS TELECASTING OF SIOUX CITY,
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PAPPAS TELECASTING OF IOWA, L.L.C.

**PAPPAS TELECASTING OF SOUTHERN
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October 13, 1998

^{9/} Admitted only in Ohio; supervision by John Griffith Johnson, Jr., a member of the D.C. Bar.

EXHIBIT A

DECLARATION

My name is Harry J. Pappas. I am the President, the Chairman of the Board of Directors, and the Chief Executive Officer, or the Managing General Partner, or the Managing Member, as the case may be, of the following corporations, general partnerships, or limited liability companies (as indicated) that hold licenses or construction permits from the Federal Communications Commission (the "Commission") to operate the full-power analog commercial television broadcasting stations set forth below:

<u>Name of Licensee or Permittee:</u>	<u>Call Sign:</u>	<u>City and State:</u>
Pappas Telecasting Incorporated	KMPH (TV)	Visalia, CA
Pappas Telecasting of the Midlands, a California Limited Partnership	KPTM (TV)	Omaha, NE
Pappas Concord Partners	KTNC (TV) KFWU (TV)	Concord, CA Fort Bragg, CA
Pappas Telecasting of Nevada, a California Limited Partnership	KREN (TV)	Reno, NV
Pappas Telecasting of Lexington, a California Limited Partnership	WBFX (TV)	Lexington, NC
Pappas Telecasting of Opelika, a California Limited Partnership	WSWS (TV)	Opelika, AL
Pappas Telecasting of the Carolinas, a California Limited Partnership	WASV (TV)	Asheville, NC
Pappas Telecasting of Sioux City, a California Limited Partnership	KPTH (TV)	Sioux City, IA
Pappas Telecasting of Iowa, L.L.C.	KPWB-TV	Ames, IA

Pappas Telecasting of Southern
California, L.L.C.

New

Avalon, CA

Harry J. Pappas and Stella A. Pappas

WMMF-TV

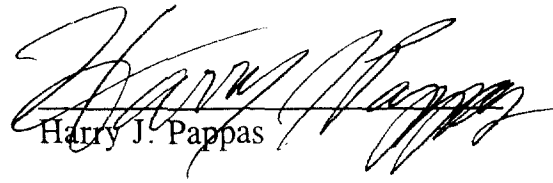
Fond du Lac, WI

As the Commission is aware from previous submissions to it on my behalf, I have spent my entire career in the television broadcasting industry, beginning in the 1970's with the inauguration of KMPH (TV). I have been involved in a direct, "hands-on" manner in the planning, construction, development, acquisition, and operation of numerous television stations, and I have approximately 30 years of experience in this field.

Various of my companies have recently been engaged in refinancing their senior debt in connection with the acquisition of, and in some cases capital expenditures to improve, some of the stations listed earlier in this Declaration. In the course of my extensive discussions with our senior lenders, I have had occasion to discuss with them the prospects of financing the construction of digital television broadcasting ("DTV") facilities. One of the recurring concerns that has been expressed in those conversations is that from a lender's perspective, DTV -- at least initially and perhaps for an indefinite period of time -- is unlikely to enjoy sufficient audience support to attract a minimum base of advertising revenue to justify the capital costs to build out those DTV facilities. It has been made clear that a critical component in maximizing audience is to ensure that cable television subscribers (which, in some of my companies' markets, represent as much as a half or more than a half of the total available viewership of the stations) can and will have cost-effective access to the advertiser-supported programming of terrestrial DTV stations. Although we have not yet formally presented a proposal to our lenders for a financing commitment for the DTV construction costs of any of our stations, I am confident that in the absence of a certainty that cable television subscribers will have such cost-effective access, our lenders will be extremely reluctant, if not absolutely opposed, to financing those costs. I also believe that the sooner that such certainty can be had, the easier and faster it will be to arrange financing for the DTV facilities construction, which will enable my companies to implement their DTV build-out plans in advance of the schedules for the completion of the

construction of their DTV stations that have been established by the Commission.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8~~th~~ day of October, 1998.


Harry J. Pappas